No. 12,295

In the United States Court of Appeals for the Ninth Circuit

NATIONAL BRASS WORKS, INC., A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The only previous opinion (R. 79-83) is the memorandum opinion of the Tax Court which is not reported.

JURISDICTION

This petition for review involves federal income taxes for the year 1944. (R. 85-92.) On January 21, 1947, the Commissioner of Internal Revenue mailed to taxpayer a notice of deficiency in income tax in the amount of $2,911.85 for the calendar year ending December 31, 1944. (R. 2, 8-11.) Within ninety days thereafter and on April 4, 1947, taxpayer filed a petition with the Tax Court for redetermination of the deficiency under

the provisions of Section 272 of the Internal Revenue Code. (R. 2-7, 11.) The final order and decision of the Tax Court, determining that there is a deficiency on the part of taxpayer in income tax of $2,911.85 for the year 1944, was entered on March 25, 1949. (R. 84.) The case is brought to this Court by taxpayer's petition for review filed June 3, 1949 (R. 85-92), within three months after the Tax Court's decision was rendered, pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, and Section 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the sum of $13,071.08, paid by taxpayer to the Treasurer of the United States in settlement of the Price Administrator's claim for treble damages on account of wilful violations of price ceiling regulations adopted by the Office of Price Administration under the Emergency Price Control Act of 1942, was deductible as an ordinary and necessary business expense in computation of taxpayer's income tax for the calendar year 1944.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, *infra.*

STATEMENT

The case was submitted to the Tax Court on a stipulation of facts. (R. 13-17.) The Tax Court adopted this stipulation in toto as its findings of fact (R. 79), and specifically set forth as pertinent in its memorandum opinion the following parts of the stipulation:

Taxpayer is a corporation which keeps its books and files its tax returns on the accrual basis. Its 1944 return was filed at Los Angeles, California. (R. 79.)

The tax in controversy is its income tax for the calendar year 1944, in respect to which the Commissioner had determined a deficiency in the amount of $2,911.85. During this period taxpayer was engaged in the business of making and selling non-ferrous castings of brass and bronze alloy. (R. 80.)

Under the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, the Office of Price Administration was empowered to regulate the selling prices of certain products, including non-ferrous castings and the brass and bronze alloy ingots from which such castings were made. The Office of Price Administration promulgated Price Regulation 202, dated August 13, 1942, effective August 19, 1942, which regulated the selling prices of brass and bronze alloy ingots and provided, in part, as follows (R. 80):

> Sec. 1309.151. On and after August 10, 1942, regardless of any contract * * * no person shall sell * * * at a price higher than the maximum price established * * *.

Said Regulation 202 further provided (R. 80-81):

> Sec. 1309.165—Appendix A. Maximum prices for brass and bronze alloy ingot. (a) Delivery charges. The maximum prices herein established for brass and bronze alloy ingot include transportation costs to any destination within the continental United States not exceeding 25 cents per hundred weight. Actual transportation costs in excess of those so included may be charged to, and paid by, the buyer.

Regulation 202 thereafter set forth a schedule of maximum prices for various classifications of brass and bronze alloy ingots. (R. 81.)

Taxpayer at all times material purchased its requirements of brass and bronze alloy ingots from H. Kramer & Company, Chicago, Illinois. (R. 81.)

The Office of Price Administration promulgated Revised Maximum Price Regulation 125 (hereinafter sometimes referred to as RMPR 125) dated January 27, 1943, effective February 1, 1943, which established maximum selling prices of non-ferrous foundry products. (R. 81.)

RMPR 125 reduced taxpayer's maximum selling prices one and one-half cents per pound for the castings involved herein effective February 1, 1943. (R. 81.)

Taxpayer was furnished a copy of this Revised Maximum Price Regulation 125 and was aware of its provisions. Taxpayer did not reduce its prices to its customers as required by said RMPR 125. (R. 15, 81.)

Two O.P.A. investigators appeared at taxpayer's office in the spring of 1944 and examined its books. As a result of this examination, the Office of Price Administration alleged that taxpayer had violated RMPR 125. In order to settle the O.P.A. claim, taxpayer issued its check, dated July 14, 1944, made payable to the order of the Treasurer of the United States in the amount of $13,071.08 (R. 81), and was given a receipt therefor reading as follows (R. 82):

> Receipt
>
> Received this 17th day of July, 1944 check No. 3539-E dated 7/14/44 in the sum of $13,071.08, payable to the Treasurer of United States, from National Brass Works, Inc., of Los Angeles, California, in settlement of the Administrator's Claim for treble damages on account of violations of ceiling prices for non-ferrous castings under RMPR 125.
>
> (S.) Wm. H. Buckingham,
> *Enforcement Attorney.*

In 1944 taxpayer accrued on its books this sum of $13,071.08 as a business expense and deducted it in computing its income for federal income tax purposes. The Commissioner, in his statutory notice of deficiency, dis-

allowed this deduction with the following explanation (R. 82):

> (a) It is held that an item in the amount of $13,-071.08, representing "Settlement of administrator's claim for treble damages on account of violation of ceiling prices," and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23 (a) or (f) of the Internal Revenue Code.

This disallowance by the Commissioner gave rise to the instant appeal, and the allowability of the claimed deduction is the only issue involved here. (R. 82.)

The amount of $13,071.08 was based upon sales made by the taxpayer, at prices in excess of the maximum prices established under RMPR 125, and which sales had been made during the period February 1, 1943, to January 31, 1944, to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205 (e) of the Emergency Price Control Act of 1942. (R. 82-83.)

The Tax Court explicitly made the following ultimate fact finding (R. 83):

The payment of $13,071.08 which was made to the O.P.A. in compromise of the Price Control Administrator's claim for treble damages was not an ordinary and necessary business expense of the taxpayer within the meaning of Section 23 (a)(1)(A) of the Internal Revenue Code. (R. 83.) Accordingly, the Tax Court decided that there was a deficiency in taxpayer's income tax of $2,911.85 for the year 1944. (R. 84.)

SUMMARY OF ARGUMENT

A. Taxpayer's conceded violations of the ceiling price regulation, promulgated under the Emergency Price Control Act of 1942, were knowing and intentional. Taxpayer expressly stipulated that it was furnished a

copy of the price regulation and was aware of its provisions, and did not reduce its prices to its customers as required by the regulation. Thus, the factual situation here is in striking contrast to that involved in *Jerry Rossman Corp.* v. *Commissioner,* 175 F. 2d 711, the decision of the Court of Appeals for the Second Circuit upon which taxpayer principally relies. There, the overcharges and violations were concededly unintentional. The alleged circumstance, even if true, that taxpayer's supplier had not reduced its net prices to taxpayer to the same extent as the ceiling price regulation required taxpayer to reduce its prices to its customers constituted no justification for taxpayer's wilful violation of law nor authorized it by self-help to obtain a competitive advantage. Taxpayer's remedy was not to flaunt the regulation, but to file a protest with the Administrator and in the event the protest was overruled, to adjudicate the question before the Emergency Court of Appeals. Again, quite unlike the *Rossman* case, where taxpayer itself discovered it had unwittingly overcharged its customers and voluntarily reported the situation to the Office of Price Administration, here it is admitted that the overcharges were only discovered as a result of the examination of taxpayer's books by O.P.A. investigators, and the $13,071 was paid to the United States expressly in settlement of the Administrator's claim for treble damages on account of violations of ceiling prices.

Furthermore, there is no proof in the instant record that the sum paid to the United States did not include an amount in excess of the overcharges. The burden was upon taxpayer in the Tax Court, not merely to overcome the presumptive correctness of the Commissioner's determination, but further to sustain the burden of persuasion to establish the facts and its right to the alleged deductions. In the *Rossman* case, on the other hand,

the payment to the United States was shown to have been limited to the overcharges.

B. The payment sought to be deducted was made in settlement of a cause of action to impose a penalty for commission of acts violative of a sharply defined national policy to stabilize commodity prices so as to prevent wartime inflation and profiteering and their disruptive causes and effects. Inflation was stated by a Congressional Committee which recommended the legislation to be the most destructive of all the consequences of war, except human slaughter. By Section 205 (e) of the Emergency Price Control Act, Congress purposed as one means towards accomplishment of this sharply defined national policy to impose a money penalty as a deterrent upon wilful violators and the $13,071 paid here to the United States was paid *qua* penalty in settlement of such a sanction. In practice the principal sanction afforded by Section 205 (e) was the Administrator's suit; the consumer's right of action was limited and was the incident, not the rule. Thus, the section provided a double sanction, in one part penal and in another, remedial. The sum recovered by the United States clearly was not intended for compensation, for the United States suffered no loss whatsoever, but was in the nature of an exaction to be levied upon taxpayer as a penal deterrent.

C. The decisions of this Court and other courts establish that the *Rossman* case is incorrect in its holding that the Administrator's claim to recover the overcharge is a claim substituted for that of the "terminal buyer" for "restitution" and that Congress did not intend a penalty. For example, even the terminal buyer was authorized to recover triple damages in cases where he had not paid the overcharge and had thus suffered no actual loss. In any event, actions by the Administrator on behalf of the United States bore no color whatsoever of "restitu-

tion". Single damages were no more paid in compensation to the United States than multiple damages. The United States suffered no loss in any amount and every dollar paid to it was an exaction. The wrong which Congress intended the Price Administrator to redress was assuredly a public, not a private wrong. Moreover, the sum paid to the United States for the ceiling price violations was not proved by taxpayer here to have been limited to the amount of the overcharge, and hence, even under the *Rossman* holding, taxpayer has not established that the amount sought to be deducted did not include a penal sum.

Nor, as suggested in the *Rossman* case, was the Administrator's claim to the overcharge based upon a right of appropriation by the sovereign to *bona vacantia* in cases where the terminal buyer was inaccessible. *Bona vacantia,* like escheat, applies to specific property, title in which formerly was vested in some individual. Under Section 205 (e), a terminal buyer's right of action might never come into existence, and indeed, in a majority of cases never arose. Thus, there was no unclaimed property here (or in a typical case) belonging to any unknown individual, which Congress could have intended, by means of the Administrator's ~~taxpayer's~~ right of action under Section 205 (e), to appropriate as *bona vacantia.*

Finally, any such right of appropriation must lie, not in the United States, but in the several states, since the property supposed to be appropriated is located, if anywhere, in the several states and belonging to their residents. For the purpose of application of the doctrine of *bona vacantia,* certainly the several states and not the United States are respectively the sovereign in whose favor the rule runs.

D. Under well settled principles, the effectiveness of a penalty imposed may not be impaired through dis-

allowance as a deduction in computing income taxes. The intent of Congress was to enforce the public policy by exaction of the entire penal sum, not a discounted amount. In application of this rule, no distinction can properly be made between "penalties" and "penalties", as suggested in the *Rossman* case. The amount of the penalty fixed by Congress is a binding legislative measure of the appropriate sanction. Congress thereby supplies the full penal consequence of the violation of the law; surely it is not the function of taxpayers, the Treasury and the courts to decide that in one case a discount should be permitted by indirection as an incident of tax collection, and in another case the discount should be denied. Indeed, such a rule seems incapable of practicable administration, and it is difficult to believe that Congress could have intended such an interpretation. The Supreme Court in *Commissioner* v. *Heininger,* 320 U. S. 467, confirms the Commissioner's contention here. Although many courts have applied the controlling principle, no other case, except the recent *Rossman* decision, had permitted tax deduction of a payment concededly penal. In any event, the *Rossman* decision is also distinguishable factually from the instant case in that there the violation was concededly unintentional, while here it was knowing and wilful, and there the payment to the United States did not exceed the amount of the overcharge, while here taxpayer has not proved that its payment to the United States was limited to the overcharge.

Administrative rulings denying deductibility of payments made to the United States for violation of Section 205 (e) of the Emergency Price Control Act have consistently supported the Commissioner's position here. Moreover, in the enforcement of the emergency price legislation, the exaction of the overcharge from price violators was considered a penalty by the authorities who collected it.

Again, payment of such a penalty is not properly a business expense and the Tax Court's construction of the words "ordinary and necessary" with respect to this payment and their proximate relation to the business here is certainly permissible. Deductions as grants made in the exercise of legislative grace must not be perverted to frustrate national policy, and the Tax Court did not err here in interpreting the language of the statute to prevent such misuse.

Indeed, even on the distinction taken in the *Rossman* case, the penalty paid here for wilful violations should be denied as a tax deduction, since allowing it clearly will frustrate the policy of Congress proscribing profiteering in time of national emergency.

ARGUMENT

The Sum Paid to the United States in Settlement of the Price Administrator's Claim for Treble Damages on Account of Taxpayer's Wilful Violations of Ceiling Prices Was Properly Held Not Deductible as an Ordinary and Necessary Expense of Taxpayer's Business

A. *Taxpayer's conceded violations of the ceiling price regulation promulgated under the Emergency Price Control Act of 1942 were knowing and intentional and taxpayer failed to establish that the sum exacted by the United States in settlement did not include an amount in excess of the overcharge*

The facts are not in dispute. Indeed, the case was submitted on a stipulation of fact and the Tax Court's findings are thus based on taxpayer's own admissions. (R. 79.) To summarize the pertinent facts, taxpayer has conceded and the Tax Court has found that during the period involved, under the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23 (Appendix, *infra*), the Office of Price Administration was em-

powered to regulate the selling prices of non-ferrous brass and bronze alloy castings, in the business of making and selling which taxpayer was engaged. (R. 13, 80.) By Revised Maximum Price Regulation 125, effective February 1, 1943, the Office of Price Administration established such maximum selling prices for taxpayer's products and, in particular, for the castings here involved admittedly "reduced petitioner's [taxpayer's] maximum selling prices one and one-half cents per pound". (R. 15, 81.) Indeed, taxpayer has explicitly stipulated that it "was furnished a copy of said RMPR 125 and *was aware of its provisions*" (italics supplied), and taxpayer *"did not reduce its prices* to its customers as required by said RMPR 125" (italics supplied). (R. 15, 81.)

Thus, the factual situation here is in striking contrast to that which the Second Circuit Court of Appeals passed on in *Jerry Rossman Corp.* v. *Commissioner,* 175 F. 2d 711, 712, upon which taxpayer principally relies. Here the overcharges and violations were concededly deliberate. Not only did taxpayer instantly fail to take practicable precautions against the occurrence of violation, but on the contrary knowingly and wilfully overcharged, and the sum of $13,-071.08 which it paid in order to settle the O.P.A. claim was concededly (R. 16, 82-83)—

> based upon *sales* made by petitioner [taxpayer], *at prices in excess of the maximum prices established under RMPR 125,* which sales were made during the period February 1, 1943 to January 1, 1944, * * *. (Italics supplied.)

This was no instance of a violator "for whom the daedalian mazes of the regulations had proved too much" (*Jerry Rossman Corp.* v. *Commissioner, supra,* p. 714) but of a knowing violator who on the face of its own statement wilfully and deliberately presumed

to impose its own judgment over the public authority duly constituted by Congress for determining during war and inflationary emergency the selling price of the products involved. The standards which Congress prescribed in the public interest to guide the Administrator's exercise of his authority to fix prices of course did not necessarily reflect the private financial interest of any particular corporation. These are stated by the Supreme Court in *Yakus* v. *United States,* 321 U. S. 414, 420:

> By § 2 (a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

Certainly, taxpayer in fixing its own prices in excess of those prescribed by the regulations "given the force of law" (*Yakus* v. *United States, supra,* p. 435) was not interested in what was generally fair and equitable and would effectuate the purposes of the Act. Clearly, the alleged circumstance, even if true, that taxpayer's supplier, H. Kramer & Company, had only reduced its net price to taxpayer by three-fourths cent per pound or less from August 1942 on,[1] whereas RMPR 125 re-

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[1] Moreover, the record by no means establishes the assertion that the net reduction to taxpayer by its source, H. Kramer & Company, in metal ingot cost was only one-half to three-fourths cent per pound. (Br. 3.) Indeed, the Tax Court made no finding to that effect, although requested by the taxpayer. Apparently, taxpayer relies on Joint Exhibits 1-A, 2-B and 3-C, attached to the stipulation. (R. 14-15.) However, these exhibits establish at most that between August 11, 1942 (Inv. 17515), and August 28, 1942 (Inv. 17732), H. Kramer & Company began stamping their invoices thus: "The above prices include 0.75¢ per pound to apply on transportation costs in excess of 0.25¢ per pound. Carload freight rate from

quired taxpayer to reduce its prices one and one-half cents per pound, constitutes no justification nor "mitigating circumstances" (Br. 3, R. 88-89) for taxpayer's conceded and knowing violation of law, or authorized it by self-help to obtain a competitive advantage.[2] As the *Yakus* case establishes (pp. 427-431), taxpayer's remedy was not to flaunt the regulations having the force of law, but to file a protest with the Administrator against the regulations and in the event the protest was overruled, to adjudicate the question before the Emergency Court of Appeals. Indeed, the *Yakus* case ruled that at least before their invalidity had been adjudicated by recourse to this procedure prescribed by the statute, the validity of the Administrator's regulations was not subject to attack even in criminal prosecutions for their violation. Surely, taxpayer may not attack them in this proceeding. Citing the *Yakus* case, this Court held in *Shyman* v. *Fleming,* 163 F. 2d 461, 464: "Such an attack is cognizable only in a proceeding in the Emergency Court."

Chicago to Los Angeles $1.17 per cwt." A careful analysis of all the invoices which are in evidence reveals that only five different kinds of ingots were sold, *both before and after* August 19, 1942, from which a comparison can be made. On three kinds of ingots the prices were reduced a net of 75¢ per hundredweight and on the other two kinds of ingots, the prices were reduced a net of 50¢ per hundredweight. But see Invoice 17732, dated August 28, 1942 (Joint Ex. 1-A), the first item on which is 358 "Commercial 88-10-2 Ingot (215) 'N'" at $17.75 and the third item on which is 95 "Commercial 88-10-2 Ingot (215) 'N'" at $17.25. That shows a variance of 50¢ per hundredweight on the same kind of ingot on the same date and on a single invoice.

[2] Again, amendment to the price ceiling regulation RMPR 125, *effective February 1, 1944, after the date of all over-ceiling sales here involved*, is wholly immaterial and irrelevant to the issue here. (R. 16-17, Br. 2.) As already stated, the sum of $13,071 paid by taxpayer to the United States was based upon its sales made during the year February 1, 1943, to January 31, 1944, all made in excess of maximum prices then in effect established under RMPR 125. (R. 15, 82-83.)

Moreover, quite unlike the *Rossman* case, where taxpayer itself discovered that it had unwittingly overcharged its customers and (*Jerry Rossman Corp.* v. *Commissioner, supra,* p. 711)—

> Although the Office of Price Administration had not started any investigation of the taxpayer's charges and had not until then undertaken to investigate them, its president asked the advice of the Office as to what he should do

here it is admitted "Two O.P.A. investigators appeared at petitioner's office in the spring of 1944 and examined its books" (R. 15), and as a result of this examination the O.P.A. alleged that taxpayer had violated RMPR 125, an allegation the truth of which, as already noted, is here admitted (R. 15-16, 81-83). Again, in the *Rossman* case, no charge was ever made against the taxpayer there by the Office of Price Administration; indeed, the official to whom taxpayer's president there went (pp. 711-712)—

> suggested that he return the overcharges to the customers; but this was altogether impracticable. * * * For these reasons the official consented that the taxpayer should settle the whole matter by paying the gross overcharge to the United States in one sum * * *.

Here, on the other hand, the $13,071 was paid to the United States as a result of investigation by the Government of taxpayer's books, after taxpayer had wilfully violated the regulations for a period of at least a year and was expressly paid (R. 16, 82)—

> in settlement of the Administrator's Claim for *treble damages on account of violations of ceiling prices* for non-ferrous castings under RMPR 125. (Italics supplied.)

Furthermore, taxpayer concedes in its brief here (pp. 3, 7), that there is no proof in the instant record

that the $13,071 paid to the United States did not include a sum in excess of the overcharges. Clearly, the burden was upon taxpayer in the Tax Court, not merely to overcome the presumptive correctness of the Commissioner's determination, but further to sustain the burden of persuasion to establish the facts and its right to the alleged deductions. *Helvering* v. *Taylor,* 293 U.S. 507, 514-515; *Boehm* v. *Commissioner,* 326 U. S. 287, 294, rehearing denied, 326 U. S. 811. In the *Rossman* case, on the other hand, the payment to the United States was shown to have been limited to the overcharge.

B. *The payment sought to be deducted was made in settlement of a cause of action to impose a penalty for commission of acts violative of a sharply defined national policy*

That the Emergency Price Control Act of 1942 represented a sharply defined national policy is scarcely open to question. In *Hecht Co.* v. *Bowles,* 321 U. S. 321, 331, the Supreme Court, quoting from the report of the Senate Committee on Banking and Currency, which had recommended the enactment (S. Rep. No. 931, 77th Cong., 2d Sess., p. 2), stressed "the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' ". The Supreme Court further explained in *Yakus* v. *United States,* 321 U. S. 414, 431-432:

> The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act, that there was grave danger of wartime inflation and the disorganization of our economy from excessive price rises.

See also S. Rep. No. 931, *supra*, p. 3, quoted in the footnote.[3]

In passing this statute, Congress acted in pursuance of a sharply defined policy, namely, to stabilize commodity prices so as to prevent wartime inflation and profiteering and their disruptive causes and effects. *Yakus* v. *United States, supra,* p. 423. This policy was expressly spelled out in Section 1 (a) of the Act, as also quoted and summarized by the Supreme Court in the *Yakus* case (p. 423):

> Section 1 (a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war," and that its purposes are: "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; . . .*

[3] S. Rep. No. 931, *supra*, p. 3:

> * * * the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent. The cost of living must be stabilized.
>
> The committee has largely accepted the substantive provisions of the House bill, but regards prompt enactment of this stronger bill as imperative to the safety of our country.

Moreover, the statute not only stated the legislative objectives but Congress there (*Yakus* v. *United States, supra,* p. 423):

> prescribed the *method of achieving that objective—maximum price fixing* * * *, and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power and the particular prices to be established. (Italics supplied.)

For either a seller or a buyer (except a consumer) to violate a maximum price regulation promulgated under the Act was made unlawful. Under the heading "Prohibitions", Congress prescribed (Emergency Price Control Act, *supra,* Section 4 (a)):

> Sec. 4 (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

In the instant case, taxpayer during the period of the entire year commencing February 1, 1943, and ending January 31, 1944 (R. 15-16, 81-83), precisely when the war emergency was at its height and the disruptive influences of inflation most serious, committed wilful violations of the maximum prices fixed by law and knowingly entered into a course of conduct which

tended to defeat the congressional objective and the chosen method for achieving that objective, namely, to protect the nation from that inflation, which, as has been seen, the Senate Committee regarded as the most destructive consequence of war except human slaughter. We contend that Congress fully purposed, as one means towards accomplishment of this sharply defined national policy, to impose a money penalty as a deterrent upon wilful violators and that the $13,071 paid here to the United States was paid *qua* penalty in settlement of such a sanction.

Section 205 of the Emergency Price Control Act set forth the provisions for its enforcement. These included injunctive relief, whenever in the judgment of the Administrator present or threatened violations existed (Section 205 (a)); criminal penalties against any person wilfully violating the provisions of Section 4 (Section 205 (b)); the licensing of the sale of any regulated commodity whenever in the judgment of the Administrator such action was necessary to effectuate the purpose of the Act (Section 205 (f)). Finally, Section 205 (e) (Appendix, *infra*), as originally enacted, fashioned an action for $50 or treble the amount of the overcharge, whichever was the greater, against anyone selling a commodity in violation of a maximum price order. This right of action was conferred upon persons who bought such commodities "for use or consumption *other than* in the course of trade or business". (Italics supplied.) In all other cases the Administrator was authorized to bring the action on behalf of the United States.

During the period instantly involved, Section 205 (e) was applicable in amended form as enacted by Section 108 (b) of the Stabilization Extension Act of 1944, c. 325, 58 Stat. 632 (50 U.S.C. App. 1940 ed., Supp. IV,

Sec. 925) (Appendix, *infra*), quoted for convenience in the footnote.[4]

Under the amendment, treble damages were denied and the amount of the recovery was limited to the overcharge or $25, whichever was greater, if the defendant

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[4] Sec. 108. * * *

*   *   *   *   *   *   *

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine; *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

proved that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." However, as already set forth, *supra,* under subpoint A, taxpayer's violations here were wilful and were not the result of failure to take practicable precautions against their occurrence. The applicable rule has recently been succinctly stated and authorities cited in *Woods* v. *Corsey,* 200 P. 2d 208, 211-212 (not yet officially reported), by the California District Court of Appeal, Second District, as follows:

> It has been frequently held that a "willful" violation, within the meaning of the Price Control Act, is one which is intentional, knowing, voluntary, deliberate, or obstinate, although it may be neither malevolent nor with a purpose to violate the law. *Zimberg* v. *United States,* 1 Cir., 142 F. 2d 132, 137, 138; *Bowles* v. *Weitz,* D.C. Pa., 64 F. Supp. 829, 833; *Bowles* v. *Krasno Bros. Glove & Mitten Co.,* D.C. Wis., 59 F. Supp. 581; *Bowles* v. *Arcade Inv. Co.,* D.C. Minn., 64 F. Supp. 577. * * *

No evidence whatsoever of mistake or inadvertence on taxpayer's part is disclosed by the instant record. On the contrary, taxpayer has itself stipulated that it was furnished a copy of the governing maximum price regulation, was aware of its provisions, did not reduce its prices to its customers as required by the regulation, paid to the United States the sum of $13,071 in settlement of the Administrator's claim for treble damages on account of violations of this regulation, and the sum was based upon sales made by taxpayer between February 1, 1943, and January 31, 1944, at prices in excess of the maximum prices established under the regulation. (R. 15-16, 81-83.) Hence, here, under the amended Section 205 (e), taxpayer was

> liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the fol-

> lowing sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine; * * *.

Again, as already stated, taxpayer concededly has not established that the $13,071 paid to the United States did not include amounts in excess of the overcharges. (Br. 7.)

Section 205 (e), in its amended form here applicable, was broadened to enable the Administrator to institute an action on behalf of the United States even where a buyer (not buying for use in trade or business) might sue, in the event such a buyer failed to institute action within thirty days from the date of the violation. However, instantly it was stipulated, as the Tax Court found, that the sales were made (R. 16, 83)—

> to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205 (e) of the Emergency Price Control Act of 1942.

Hence, the instant case is one where in the language of the section the Administrator was expressly authorized to bring action on behalf of the United States since the buyer "is not entitled for any reason to bring the action". Such was "the Administrator's Claim for treble damages" in settlement of which the disputed sum was here paid. (R. 16, 82.)

Moreover, as will be seen below, the principal sanction afforded by Section 205 (e) was the Administrator's suit; the consumer's right of action was the incident, not the rule. This double sanction which Section 205 (e) provided in one part penal and in another remedial is certainly not unprecedented. Al-

most twenty-five years ago the Court of Appeals for the Second Circuit plainly delineated similar enforcement machinery where in *Sullivan* v. *Associated Billposters and Distributors,* 6 F. 2d 1000, citing the leading case of *Huntington* v. *Attrill,* 146 U. S. 657, 667, 668, it said (p. 1009):

> A statute may be penal in one part and remedial in another. If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury. [Cases cited.] But in so far as the statute authorizes a third person, not the loser, to recover treble damages, or the money lost, the statute is penal. [Cases cited.]

In *Porter* v. *Warner Co.,* 328 U. S. 395, the Supreme Court, analyzing the nature of the remedies afforded by Section 205 (e), characterized as "penalties" the money recoveries which came to the United States Treasury in suits brought by the Administrator [5] authorized under its terms, as follows (pp. 401-402):

> To the extent that damages might properly be awarded by a court of equity in the exercise of its jurisdiction under § 205 (a), see *Veazie* v. *Williams,* 8 How. 134, 160, § 205 (e) supersedes that possibility and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages and *whereby the Administrator on behalf of the United States may seek damages in the nature of penalties.* Moreover, a court giving relief under §205 (e) acts as a court of law rather than as a court of equity. * * *

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[5] Cf. *Testa* v. *Katt,* 330 U. S. 386, 389, in which the Court assumed without deciding that Section 205 (e) was a penal statute.

> When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay such person part of the *penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e).* * * * (Italics supplied.)

Bowles v. *Farmers Nat. Bank of Lebanon, Ky.*, 147 F. 2d 425 (C.A. 6th), directly supports the Commissioner's contention that the Administrator's cause of action under Section 205 (e), which taxpayer here settled, was for a penalty. There, the alleged violator of a price ceiling had died and the ultimate question was whether the Administrator's action survived against his executor. Thus, whether the Administrator's cause of action was penal in nature or not was immediately in issue, since if the action was penal, it did not survive. The court held that while private rights and interests were incidentally necessarily affected, the controlling purpose of the statute was to protect the public during the war emergency, and that the wrong which the Administrator's action redressed was a wrong to the public, not to any individual. (P. 428.) Listing the several remedies above mentioned which Section 205 authorized the Administrator to pursue, the court said (p. 428):

> The suit for recovery is plainly intended by Congress to be used as a method of "enforcement" equally with the other methods prescribed. Hence we conclude that the manifest purpose of § 205 (e) was to prevent the inflationary tendencies sought to be curbed by the Act as a whole, through *punishment* of violators of the statute by payment of penalties either to the Administrator or to the person injured. (Italics supplied.)

Clearly as to the Administrator's suit, the damages imposed upon the violator were not compensatory; the

Government suffered no loss from the transaction. Moreover, in practice, the Administrator's suit was the rule, the individual buyer's, the exception. Thus, the court said (p. 428):

> In the present case recovery is to be paid not to the person injured, but to the Government. In fact in the majority of instances both original § 205 (e) and the amendment make it difficult for the purchaser to recover. As to all sales for use or consumption in the course of trade or business, that is as to the innumerable transactions in wholesale or retail trade the right of recovery is vested in the Administrator.

Similarly, the opinion in *Porter* v. *Elliott,* 69 F. Supp. 652 (E.D. Pa.), affirmed *sub nom. Fleming* v. *Elliott,* 163 F. 2d 215 (C. A. 3d), upon the authority of *Porter* v. *Montgomery,* 163 F. 2d 211 (C. A. 3d), emphasized these factors as illustrating the penal features of Section 205 (e), saying (p. 655):

> The suit for triple damages under Section 205 (e) was brought by a public official, the Price Administrator, on behalf of the United States, and this fact, we feel, manifests the intent of Congress—to afford public redress whenever and wherever a violation occurs in order to effectuate the purposes of the Act. The Act, in addition to giving to the Administrator the right to sue for triple damages in case of a violation, also confers a similar right upon an aggrieved party. This, however, does not alter the fact that Congress intended that the public should be redressed because in reality the instances where an individual institutes suit and not the Administrator are comparatively few, and further the right granted an aggrieved party is merely incidental to the essential purpose, that of enforcement of the provisions of the Emergency Price Control Act.

In *Porter* v. *Montgomery,* 163 F. 2d 211,[6] the Third Circuit in a clearly reasoned decision likewise held that the Administrator's action under Section 205 (e) was penal and, hence, abated by reason of the death of the defendant. The Court said (p. 215):

> A civil action is for damages if it is brought for the compensation of the injured individual. It is for a penalty if it seeks to obtain a sum of money for the state, an entity which has not suffered direct injury by reason of any prohibited action. In order to obtain damages the loss must flow out of the wrong and be its natural and proximate consequence. *Smith* v. *Bolles,* 132 U.S. 125, 130, 10 S. Ct. 39, 33 L. Ed. 279. A penalty need have no causal connection with the wrong inflicted. In a penal statute the penalty is inflicted by a law for its violation. In the case at bar the sum sought to be recovered by the Administrator clearly is not intended for compensation whereby Montgomery should reimburse or compensate any person whom he injured by sales above ceiling price. The sum sought to be recovered is in the nature of an exaction, to be levied upon Montgomery or his heirs as a penalty to aid in the prevention of a repetition of an offense prohibited by the Act.

Within the current year, in *Fields* v. *Washington,* 173 F. 2d 701, the Third Circuit has confirmed adherence to its ruling in *Porter* v. *Montgomery, supra*, and once more explained its rationale. Thus, in holding there that an action by an individual under another statute was not for recovery of a penalty, the court explained (p. 703):

> Here, however, the suit is not by a public officer to recover a sum of money which will be paid into the public treasury. If so it would doubtless be a suit

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[6] Judge Stephens of this Court was one of the three judges who rendered this decision.

for a penalty and, therefore, cognizable under that section. *Porter* v. *Montgomery,* 3 Cir., 1947, 163 F. 2d 211. On the contrary, it is an action for damages brought to compensate the individual who has been injured. It is, therefore, not in any true sense of the term an action for a penalty. See *Huntington* v. *Attrill,* 1892, 146 U.S. 667, 673, 674, 13 S. Ct. 224, 36 L. Ed. 1123; *Sullivan* v. *Associated Billposters and Distributors,* 2 Cir., 1925, 6 F. 2d 1000, 1008, 1009, 42 A.L.R. 503; *Overnight Motor Transp. Co.* v. *Missell,* 1942, 316 U.S. 572, 583, 62 S. Ct. 1216, 86 L. Ed. 1682; and the discussion of the point by Judge Biggs in *Porter* v. *Montgomery,* 163 F. 2d 211, at page 215.

Other authorities holding the action one to recover a penalty are as follows: *United States* v. *Murray,* 75 F. Supp. 216 (N.H.); *Bowles* v. *Heckman,* 224 Ind. 46, 64 N. E. 2d 660; *Porter* v. *Russell,* 271 App. Div. 542, affirmed *sub nom. Fleming* v. *Russell,* 296 N.Y. 985; *Bledsoe* v. *Lumber Co.,* 229 N.C. 128, 134, 48 S. E. 2d 50, 55; *Bowles* v. *Barde Steel Co.,* 177 Ore. 421, 164 P. 2d 692; Oglebay, Provability and Dischargeability of Judgments Against Overcharging Merchants and Landlords Under Emergency Price Control Act, 21 Journal of the National Association of Referees In Bankruptcy 39 (January 1947); Oglebay, Some Developments In Bankruptcy Law, 22 Journal of the National Association of Referees In Bankruptcy 41, 44 (January 1948).

C. *The disputed payment was not made to the United States by way of restitution nor did the United States as sovereign appropriate it as bona vacantia.*

(1)

This Court has held that the right of action on behalf of the United States vested in the Administrator by Section 205(e), as amended, of the Emergency Price Control Act, *supra,* was intended by Congress primarily

as a deterrent to the violator rather than as a method of restitution to the buyer.[7] Thus in *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, certiorari denied, 329 U.S. 720, this Court ruled (pp. 434-435):

> *Congress intended the imposition of damages on the price violator primarily as a deterrent to the violator rather than as a method of restitution to the buyer.* The provision of a $25 minimum award, regardless of the excess over the maximum, clearly shows such intent. The buyer may not have suffered a dollar's damage above the illegal excess; indeed, by making the purchase he joyfully may have aided the seller in violating the law; he may believe the excessive price a fair one and no harm done him at all; but, nevertheless, he may recover the triple damages. Ordinary breaches of contract are not compensated by attorney's fees for the successful litigant. Here the price violator must pay them. The purchaser plaintiff in bringing his action is the instrument in accomplishing the Congressional purpose of preventing inflation, of which the Senate Report 931 of the 77th Congress, 2d Sess. stated
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> "* * * of all the consequences of war, except human slaughter, inflation is the most destructive. * * * Rising prices and increases in the cost of living bring misery to our people, cause industrial unrest, and undermine our unity. * * * Living costs tend to rise more quickly than wages, [and] the burdens of war are haphazardly distributed, with the heaviest burden on the farmer, the salaried worker, the small investor, the pensioner, and the veteran, whose incomes cannot readily be expanded. Rising living costs mean labor disputes and spiraling wage demands. And the suspicion of profiteering causes discontent which hampers production are surely as the bombing of factories. Rising prices now foreshadow * * * deflation later with attendant depression and suffering. Such prospects

[7] No *criminal* penalty is, of course, involved. *Kessler* v. *Fleming*, 163 F. 2d 464, 468 (C.A. 9th).

and fears * * * sap energy and morale now. Rising prices limit production. For price uncertainties prevent future planning and long-term commitments which are an integral part of the industrial process * * *." (Italics supplied.)

Similarly in *Woods* v. *Corsey, supra,* in an action brought under the same statute by the Administrator citing and following the decision of this Court in *Porter* v. *Crawford & Doherty Foundry Co., supra,* the California District Court of Appeal held (p. 211):

> If it be a fact that one or more of the tenants failed to pay the full amount of the overcharges, this would not constitute a defense to an action for the recovery of treble damages for the full amount of the overcharges. The charging of excessive rental is a violation of the act even though the amount be not collected.

In *Garcia* v. *Ebeling Motor Co.,* 201 P. 2d 854 (not yet officially reported), the California District Court of Appeal, Second District, again followed the holding of this Court in the *Crawford & Doherty Foundry Co.* case, *supra,* and of the Sixth Circuit Court of Appeals in the *Farmers Nat. Bank of Lebanon, Ky.,* case, *supra.* In this action by a purchaser, the seller was held liable for three times the amount of the overcharge fixed in a contract to sell an automobile at an overceiling price, even though the overcharge never had been paid. The court reiterated that recovery under this section was for a penalty and the circumstances that the Administrator might bring the action, if the buyer did not, indicated that the amount recovered was a penalty. Thus, the California court there said (p. 857):

> All the arguments of appellant are based upon the erroneous assumption that the recovery allowed by the act is not a penalty. * * * It was not intended by the act, which was a measure necessary

> in wartime to stabilize prices and prevent disruptive practices resulting from market conditions, that the only remedy of a victim of wartime profiteering is to pay the ceiling price and then engage in litigation or other controversy in an attempt to retain possession of the commodity purchased, to clear his title thereto, and to be relieved of his purported obligation to pay the overcharge. Various other provisions of the act, which are referred to in the case of *Duffy* v. *Howell,* hereinafter cited, also indicate that the amount to be recovered under the act is a penalty. Furthermore, the *fact that the administrator may bring the action, if the buyer does not bring it, indicates that the amount to be recovered is a penalty.* * * * (Italics supplied.)

After citing and quoting from the opinion of this Court in the *Crawford & Doherty Foundry Co.* case, *supra,* the opinion continued (p. 857):

> The amount to be recovered under the act is a penalty. In *Duffy* v. *Howell,* 73 Cal. App. 2d Supp. 990, at pages 992-993, 166 P. 2d 411, 413 the court said: "A study of the amended Act as a whole convinces us of the legislative intent to penalize the making of a contract for a sale in excess of the ceiling price regardless of whether the amount paid thereon was in full, or in a sum, by way of partial payment, less than the proper ceiling price. As evidence of such intent the terms 'sell' and 'buy' are so defined by section 942(a), 50 U.S.C.A. Appendix, as to include 'sales, * * * and other transfers, and contracts and offers to do any of the foregoing.' Section 904, 50 U.S.C.A. Appendix, to which such definitions are also applicable, makes it unlawful to 'sell or deliver any commodity' in violation of any price fixing regulation or order, or to offer or attempt to do so. Section 925 (e), 50 U.S.C.A. Appendix, under which this action is brought, also applies where any person 'selling a commodity' violates such a regulation, order or price schedule. The term 'price' is defined

by section 942 (b) as meaning 'the consideration demanded or received in connection with the sale of a commodity.' Section 925 (e) provides that 'the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.'" It was also said correctly therein, 73 Cal. App. 2d Supp. at page 993, 166 P. 2d at page 414: "The penalty accrues when the overcharge on the price of a commodity is exacted, not when it is paid."

Again, the highest court of the State of New Jersey in *Zuest* v. *Ingra,* 134 N.J.L. 15, 45 Atl. 2d 810, referring to Section 205 (e) said (134 N.J.L. 17, 45 Atl. 2d 812):

> * * * we read the language of this Federal statute and regard the nature of its provisions as a delineation of an action for the recovery of a penalty and not as a compensating action, in the sense of making the injured party whole. * * * [8]

Further, the Court of Errors and Appeals there held (134 N.J.L. 18-19, 20, 45 Atl. 2d 812-813):

> But there is another feature in this Price Control Act indicative of its nature. The federal statute, *supra,* provides that in the event the individual suffering the injury fails to institute an action, under this section of the statute, the Federal Price Administrator may institute such action in behalf of the United States within a year from the date of the occurrence of the violation; and, further, that if the action be instituted by the Administrator the injured party shall thereafter be barred from bringing an action for the same violation. This, by plainest implication, outlines a penalty, not damages as such, because certainly the Price

[8] The ultimate holding was that the action being penal, the state court of *limited* jurisdiction, in which it had originated, could not entertain it; thus, the cited case is not in conflict with *Testa* v. *Katt, supra.*

> Administrator has suffered no damage because a landlord charges some individual an excessive rent. "Penalty" is defined in 25 C.J., § 72, under Fines, forfeitures, &c., thus: "A penalty is a sum of money of which the law exacts payment by way of punishment for the doing of some act that is prohibited or omitting to do some act that is required to be done." See, also, 36 C.J.S., *Fines,* § 1. The test of a penal law seems to be: Is the wrong sought to be redressed a wrong to the public or to the individual? *Huntington* v. *Attrill,* 146 U.S. 657, 668; 36 L. Ed. 1123. To overcharge or profiteer in the fact of an Act of the Congress forbidding it, during a time of national peril, is assuredly a public wrong. True it is done against the interests of an individual but that fact does not make it a private wrong. All public wrongs are done at the expense of one or a multitude of individuals.

Both the cited Sixth Circuit decision in *Farmers Nat. Bank of Lebanon, Ky., supra,* and the Third Circuit decision in the *Montgomery* case, *supra,* involved, as here, Section 205(e), as amended by Section 108(b) of the Stabilization Extension Act of 1944. Significantly, both courts held that the Administrator's action, even where limited to the amount of the overcharge, remained a penalty. Thus, the court said in *Bowles* v. *Farmers Nat. Bank of Lebanon, Ky., supra* (p. 430):

> It remains to consider the effect of the amendment of 1944 above quoted, which makes it discretionary with the District Court whether treble damages shall be recovered and permits the person charged with liability to set up certain circumstances in mitigation of the damages. In view of the considerations stated above, we conclude that in this amendment also the purpose of the Congress is prevention of the practice of selling above ceiling prices, and that here too a penalty rather than damages is involved. The amendment simply provides that in case of good faith the penalty is less than in the case of fraud. A similar situation existed in

> the statute construed in *Helwig* v. *United States*, *supra*, 188 U.S. 605 at page 612, 23 S. Ct. 427, 47 L. Ed. 614, and it was there held that the nature of the penalty is the same, only in one case it is satisfied by a lesser penalty than in the other.

Again, in the *Montgomery* case, *supra*, the Third Circuit observed that the circumstance that the judgment under Section 205(e) might amount to three times the amount of the overcharge was "not the touchstone to a correct decision" (p. 215), since under the amended statute, if the violation was not wilful nor the result of failure to take practicable precautions, the judgment might be limited to the overcharge (p. 215, fn. 11). The court concluded that the recovery by the Administrator, in either event, single or treble, was in the nature of an exaction, as a penalty to aid in the prevention of a repetition of the prohibited offense.

In *Porter* v. *Elliott*, *supra*, the District Court held (p. 655):

> We believe that this amendment did not affect the original intent of Congress and that the purpose remained the prevention of the practice of selling above ceiling prices, and we conclude, therefore, the character of the statute continued to be penal. The amendment simply provides that in case of good faith the penalty is less than in the case of fraud.

Good faith and due care at no time afforded a defense to the penal provisions of Section 205(e); before the 1944 amendment they constituted grounds for appeal to administrative discretion to accept a lesser sum than treble damages; after the amendment the limitation of liability became statutory. *Bowles* v. *Franceschini*, 145 F. 2d 510, 512-514 (C.A. 1st); *Bowles* v. *Hasting*, 146 F. 2d 94, 95 (C.A. 5th); *Porter* v. *Bledsoe*, 159 F. 2d 495 (C.A. 4th); *Star Steel Supply Co.* v. *Bowles*. 159 F. 2d 812, 816 (C.A. 6th); *Armour & Co.* v. *Blindman*,

73 F. Supp. 609 (Minn.). At all times, whatever was exacted, was paid as a penalty,

Thus, the decision and reasoning of this Court in the *Crawford & Doherty Foundry Co.* case and of the other courts cited, *supra,* established that the *Rossman* case, is incorrect in holding (p. 712) that the Administrator's claim to recover the overcharge is a substituted claim for restitution, and that Congress did not intend a penalty. As these cases rule the terminal buyer may not have actually suffered a penny's loss—he may not have paid the overcharge at all—and, having suffered no loss, he will have had no semblance of a claim for restitution. Nevertheless, Congress intended, clearly as a deterrent, that the price violator should be mulcted in an amount from one to three times the overcharge for violating the law by selling above the ceiling price, even though he never received the overcharge. Certainly actions by the Administrator on behalf of the United States bore no color whatsoever of "restitution"; under no circumstances did the United States suffer financial loss. Single damages were no more paid in compensation to the United States than multiple damages. The United States had suffered no loss in any amount and every dollar paid to it was an exaction. The wrong which Congress intended the Price Administrator to redress was assuredly a public not a private wrong. The *Rossman* case to the extent that it holds to the contrary is, we respectfully submit, incorrect.

However, the *Rossman* case, it is to be noted, explicitly ruled that only as to the overcharge itself was the Administrator's claim one for restitution; the *Rossman* opinion assumed, though it did not decide, that any addition was a penalty, and that (p. 712)—

> * * * a recovery of three times the overcharge is no less a recovery of the overcharge because it includes the penalty along with it. * * *

Here, as already several times noted, the sum of $13,071 paid to the United States was not proved by taxpayer to have been limited to payment of the overcharge and hence even under the *Rossman* holding, taxpayer has not established here that the amount sought to be deducted did not include a penal sum. In any event, for the reasons above given and in reliance upon the numerous authorities above cited, the Commissioner contends that the claim of the United States for the overcharge itself could not have been intended by Congress to have constituted a claim for compensation or restitution, but in its entirety was exacted as a deterrent sanction and a penalty.

(2)

Equally unfounded appears to be the suggestion contained in the *Rossman* case (p. 712) that the Administrator's claim to the overcharge was based upon a right of appropriation by the sovereign to *bona vacantia* in cases where the terminal buyer was "inaccessible", i.e., unknown or unidentified, and therefore the United States succeeded to the "restitution" that was the property of the terminal buyer. In the first place, as the authorities above cited establish, action against the seller lay even though the terminal buyer had himself suffered no loss whatsoever, had not paid any overcharge, and was thus not entitled to "restitution".

Secondly, the common law doctrine of *bona vacantia* in its most extensive form referred to personal property, title to which had formerly been held by some individual who either had abandoned it or whose identity had become unknown. *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 240; *Illinois Bell Telephone Co.* v. *Slattery,* 102 F. 2d 58 (C.A. 7th); *State* v. *Phillips Petroleum Co.,* 212 Ark. 530, 534-537, 206 S.W. 2d 771, 773-775. In most aspects the doctrine is analogous to *escheat,* strictly applicable only to real property. The typical

case was death intestate with no next of kin known or capable of inheriting personal property. *Bona vacantia* applies to specific property, the right, title, and interest in which formerly was vested in some citizen; on the other hand, the Administrator's claim here certainly had never vested in any individual and from its inherent nature never could vest in any consumer. Under Section 205(e) of the Emergency Price Control Act, a terminal buyer's right of action might never come into existence. Indeed, in the majority of cases this consumer's right of action never arose, and he never became entitled to sue. There was, of course, no right of action in taxpayer's customers. The wholesale purchaser was regarded under Section 4(a), *supra,* of the Act *in delicto,* if not *in pari delicto* with the seller. Congress obliged both buyer and seller engaged in commerce to know the ceiling prices of the commodities with which they dealt; Congress imposed on both the responsibility of policing their industry. *Porter* v. *Bledsoe, supra; Armour & Co.* v. *Blindman, supra; Bledsoe* v. *Lumber Co., supra.*

Indeed, there is no proof whatsoever that a terminal buyer here was overcharged at all. Thus, there was no unclaimed property here (or in the typical case), belonging to any unknown individual which Congress could have intended by means of the Administrator's right of action under Section 205(e) to appropriate as *bona vacantia.*

Finally, any such right of appropriation must lie, not in the United States, but in the several states, since the property supposed to be appropriated is located, if anywhere, *in the several states* and belonging to their residents. For the purpose of application of the common law doctrines of escheat or *bona vacantia,* certainly the several states and not the United States are respectively the sovereign in whose favor those rules run. In-

deed, this is the very holding of the case upon which the *Rossman* opinion relies and quotes, namely *Anderson Nat. Bank* v. *Luckett, supra,* where the Supreme Court said (p. 240):

> At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia.* See 7 Holdsworth, A History of English Law (2d ed.) 495-496. Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, *exist in the several states of the United States.* * * * (Italics supplied.)

See also *United States* v. *Klein,* 303 U. S. 276, 280. Hence, with deference, the *Rossman* opinion notwithstanding, we submit that in creating the right of action on behalf of the United States under Section 205(e) Congress neither purposed nor could have properly exercised a sovereign right of appropriation of *bona vacantia.*

D. *Allowance of the deduction here would frustrate a sharply defined national policy*

(1)

Under well settled principles the effectiveness of a penalty imposed as a deterrent will not be partially impaired through its allowance as a deduction in computing income taxes. The intent of Congress was to enforce the public policy by exaction of the entire penal sum, not a discounted amount. To effectuate the policy of the law, the undiminished impact of the whole penalty collected must be felt by the violator; this aim is thwarted, if the penal payment itself may constitute the basis for tax reduction, since by indirection the sanction is correspondingly lessened. Such is the reasoning of the Court of Appeals for the Fifth Circuit,

following a settled line of authority, in *Commissioner* v. *Longhorn Portland Cem. Co.,* 148 F. 2d 276, certiorari denied, 326 U.S. 728, where it was said (p. 277):

> The sense of the rule that statutory penalties are not deductible from gross income is that the penalty is a punishment inflicted by the state upon those who commit acts violative of the fixed public policy of the sovereign, wherefore to permit the violator to gain a tax advantage through deducting the amount of the penalty as a business expense, and thus to mitigate the degree of his punishment, would frustrate the purpose and effectiveness of that public policy.

Other authorities to the same effect are:[9] *Great Northern Ry. Co.* v. *Commissioner,* 40 F. 2d 372 (C. A. 8th), certiorari denied, 282 U.S. 855; *Burroughs Bldg. Material Co.* v. *Commissioner,* 47 F. 2d 178 (C.A. 2d); *Chi. R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. 2d 990, 991 (C. A. 7th), certiorari denied, 284 U.S. 618; *Tunnel R. R.* v. *Commissioner,* 61 F. 2d 166, 173-174 (C. A. 8th), certiorari denied, 288 U.S. 604; *National Outdoor Advertising Bureau* v. *Helvering,* 89 F. 2d 878, 881 (C.A. 2d); *Standard Oil Co.* v. *Commissioner,* 129 F. 2d 363 (C. A. 7th); *Helvering* v. *Superior Wines & Liquors,* 134 F. 2d 373 (C. A. 8th); *Universal Atlas Cement Co.* v. *Commissioner,* 171 F. 2d 294, certiorari denied, 336 U.S. 962; *Scioto Provision Co.* v. *Commissioner,*

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[9] On similar reasoning bankrupts who have violated laws passed for the public good cannot discount money sanctions imposed by going into bankruptcy. Thus, the imperative necessity of preventing misuse of other statutory remedies to frustrate penal sanctions enacted for the public welfare has in bankruptcy, even in absence of explicit statutory provision, contained in the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, resulted in a judicial holding that judgments for penalties are not provable and hence not dischargeable in bankruptcy. *In re Abramson,* 210 Fed. 878 (C.A. 2d); *In re Moore,* 111 Fed. 145 (W.D. Ky.); 3 Collier on Bankruptcy (14th ed., 1941), Section 63.12; Oglebay, *supra,* 21 Journal of the National Association in Bankruptcy 39.

9 T.C. 439; *Garibaldi & Cuneo* v. *Commissioner,* 9 T.C. 446. In the last two cases, sums paid to the United States for price ceiling violations were disallowed as deductions.

Commissioner v. *Heininger,* 320 U.S. 467, confirms the principle of the cited cases and the decision below, where the penalty incurred for violation of the federal statute was itself sought to be deducted (and not merely an expenditure bearing a remote relation to the illegal act).

Indeed, the *Rossman* opinion agrees that, although the Revenue Act does not expressly deny penalty deductions and (p. 713):

> the doctrine is a judicial gloss—and, for that matter, a gloss of the lower courts only, save as the Supreme Court recognized it by implication in *Commissioner* v. *Heininger* * * * it is a proper gloss (indeed we have ourselves enforced it several times); and its justification is that, when acts are condemned by law and their commission is made punishable by fines or forfeitures, to allow these to be deducted from the wrongdoer's gross income, reduces, and so in part defeats, the prescribed punishment. Obviously, to relieve the wrongdoer of a part of the tax due upon his income, in effect is to remit that much of the sanction imposed; as would at once be apparent, if we were to compare the case of a wrongdoer who has an income with that of one who has none.

Considering the scope of the *Heininger* case, the Second Circuit Court of Appeals in the *Rossman* opinion said (p. 713):

> It is possible to read it as distinguishing between the legal expenses of an unsuccessful defence and the payment of fines or forfeitures. On the other hand, it is also possible to read it as meaning that, whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends

> upon the place of sanctions in the scheme of enforcement of the underlying act. We think that the second is the right reading; *in short that there are "penalties" and "penalties" and that some are deductible and some are not.* (Italics supplied.)

The *Rossman* case concluded that the holding of the Supreme Court in *Commissioner* v. *Heininger, supra,* was "that in every case the question must be decided *ad hoc*" (p. 713); in other words, in a given case, even though a payment by a taxpayer is indisputably a "penalty", each individual instance must be decided upon its own facts and taxpayers and the administrative officers of the Treasury must determine whether its allowance as a tax deduction would "frustrate" any "sharply defined" national or state policies proscribing particular types of conduct.

While it is true the Supreme Court in the *Heininger* case observed that (p. 473):

> A review of the situations which have been held to belong in this category would serve no useful purpose for each case should depend upon its peculiar circumstances,

nevertheless, as the first of (p. 473) "A few examples * * * to illustrate the principle involved", it set forth unconditionally the following:

> Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment.

This illustration afforded by the highest court of a situation, where tax deduction consequences would frustrate sharply defined policies, is expressed absolutely and without contingency.

In the nature of things it is submitted no distinction can properly be made between penalties and penalties, as suggested in the *Rossman* case. Indeed, the amount

of the penalty fixed by Congress is a binding legislative measure of the appropriate sanction. Congress thereby settles the full punitive consequence of the violation of law; surely, it is not the function of taxpayers, the Treasury or the courts to decide that in one case a discount should be permitted by indirection as an incident of tax collection and in another case the discount should be denied. In imposing a penalty, Congress intends its exaction without discount in every case and the categorical statement in the *Heininger* opinion approving without exception the denial of a tax deduction "where a taxpayer has violated a federal or a state statute and incurred a fine or penalty" (p. 473), supports this contention.

On the other hand, the *Rossman* holding would require taxpayers and the administrative officers of the Treasury to distinguish between cases where a statutory penalty has been exacted and to construe the intent of Congress or of forty-eight state legislatures in the case of every penal statute, in order to ascertain whether allowance by tax deduction of a given statutory penalty would or would not frustrate the legislative policy. Such a rule seems incapable of practicable administration and it is difficult to believe that Congress could have intended such an interpretation.[10]

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[10] Such indeed is the reasoning of this Court in an analogous situation, where in *Helvering* v. *Hampton,* 79 F. 2d 358, 360, it was said:

> When we consider the difficulties of administering the law under a principle requiring the taxing officials to determine in every settlement made for an alleged business tort, the question whether it involved unethical conduct on the part of the business man or company seeking the deduction, it is difficult to believe that Congress could have intended such an interpretation of the act. Was the taxpayer driving the car sufficiently intoxicated at the moment of the collision—or, was the defective condition of taxpayer's falling elevator due to mere negligence or sufficiently gross misconduct—or, did the tax-

Indeed, although many courts have applied the governing principle, no other case has taken the *Rossman* distinction between "penalties" and "penalties", nor permitted deduction of a payment concededly penal.[11] Thus, in *Commissioner* v. *Longhorn Portland Cem. Co., supra,* the Fifth Circuit said (pp. 922-923):

> The test *universally* employed to determine the applicability of the doctrine to any such claimed deduction is whether the sums claimed were paid as penalties.
>
> *　　*　　*　　*　　*
>
> Though the solution of such issues usually turns upon the taxpayer's guilt or innocence of a crime, the ultimate determinative inquiry upon this appeal is whether the deduction claimed was paid as a penalty. This is illustrated by cases where, due to a compromise settlement, the question of guilt or innocence was not established, yet the deduction claimed was disallowed to the extent that it represented a payment made to extinguish a cause of action to impose a penalty. (Italics supplied.)

As the cited case and the Second Circuit's own decision in *Universal Atlas Cement Co.* v. *Commissioner, supra*, among others, settled, even where the question of guilt or innocence is not established and the payment has been due to a compromise, the tax deduction is disallowed when made, as here, in satisfaction of claims by the sovereign, federal or state, for penalties. Moreover, here, violation of law is not in doubt, for taxpayer has conceded it.

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payer surgeon use his scalpel in an operation with which he was sufficiently inexperienced—to warrant finding of moral turpitude? Numberless such questions would arise, impracticable of solution by the investigators and agents of the Treasury.

[11] While the *Rossman* opinion, as previously discussed, in its first part held the payment there to constitute "restitution" only, its latter part assumed alternatively "that we are wrong, and that the payment can be regarded as that of a penalty". (P. 713.)

Again, the *Longhorn Portland Cement Co.* case (p. 922) supports our reading of the *Heininger* case, namely, that sums paid as penalties are never deductible, whereas expenses incurred even in the unsuccessful resistance of a penalty prosecution may be so remote as not required to be denied as a matter of law unless allowance would frustrate sharply defined public policies. Allowance of the penalty itself must necessarily mitigate the deterrent which Congress imposed; expenses in defense of prosecution certainly bear a remoter relation to the illegal act. Indeed, the reasoning of the *Rossman* case on the matter of deduction of the legal expenses of an unsuccessful defense (p. 713) appears to express an argument which the Supreme Court disapproved in the *Heininger* case, as follows (p. 472):

> We think that this reasoning, though plausible, is unsound in that it fails to take into account the circumstances under which respondent incurred the litigation expenses.

In any event, the *Rossman* decision on this point also is distinguishable factually from the instant case in that there the violation was concededly unintentional, while here it was knowing and wilful; there, the payment to the United States concededly did not exceed the amount of the overcharge, here taxpayer has not proved that its payment to the United States of $13,071 was limited to the overcharge.

(2)

Administrative rulings denying deductibility of payments made to the United States for violation of Section 205 (e) of the Emergency Price Control Act have over the course of the years consistently supported the Commissioner's position here. I. T. 3627, 1943 Cum. Bull. 111; I. T. 3799, 1946-1 Cum. Bull. 56, 57. Only

where the Administrator could not under the statute have compelled payment, were overcharges paid to him ruled deductible, as for example, "voluntary" payments made to the United States on account of price ceiling violations during the six months period January 30, 1942, the date of approval of the Act, to July 31, 1942, on which date Section 205 (e) became effective (I. T. 3627, *supra,* p. 113); payments made to the United States on account of overcharges to consumers or users made before the 1944 amendment (after July 31, 1942, and before July 1, 1944), during which period no right of action based on sales to consumers was vested in the United States (I. T. 3630, 1943 Cum. Bull. 113, and I. T. 3800, 1946-1 Cum. Bull. 82, 83).

The disallowance by these administrative rulings of payments made to the United States is not inconsistent with the Treasury's allowance of such payments as deductions when made in satisfaction of a consumer's claim for overceiling violations, but accords with the rule long settled in the federal courts, discussed *supra,* distinguishing between the grant of a civil right of action to a private person and a deterrent sanction exacted by the state possessing no compensatory character whatsoever. *Huntington* v. *Attrill, supra; Overnight Motor Co.* v. *Missell,* 316 U. S. 572, 583; *Sullivan* v. *Associated Billposters and Distributors, supra; Fields* v. *Washington, supra.* In any event, it surely assists taxpayer in no way here, should it be supposed that the Commissioner has been over-generous in permitting allowances in the case of consumers' claims.

Moreover, the administrative practice in the enforcement of the emergency price legislation demonstrates that the exaction of the overcharge from price violators was considered a deterrent by the authorities who collected it. Certainly, the inference seems plain that a

mitigation of this sanction would have been regarded as frustrating the statutory policy, in such a case, as here, involving wilful and knowing violations.[12] This appears not only from the cases cited, *supra*, but from a statement of O.P.A. enforcement policy submitted in 1945 by Administrator Bowles at a Hearing of the Senate Committee on Banking and Currency then considering extension of price control. The Administrator made clear that settlements of violations for the amount of the overcharge were primarily exacted both under the 1942 Act and the 1944 amendment, for "the deterrent effect of the sanction." (Senate Hearings Before the Committee on Banking and Currency on S. J. Res. 30, 79th Cong., 1st Sess., p. 95.)[13] Again, in a statement issued on signing the Act containing the 1944 amendment to Section 205 (e), President Roosevelt clearly implied that the governing 1942 Act contained "penalties against non-willful violations" which the amended Act was "relaxing" (not extinguishing), and that in any event no favor was being thereby shown

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[12] The quotation in the *Rossman* opinion (p. 714) from a letter by the Price Administrator is not to the contrary, and in any event refers only to cases involving innocent violations.

[13] The full statement of the Administrator in this connection reads as follows (Senate Hearings, *supra*, pp. 89, 95):

> The provision [under the 1944 amendment] limiting the Administrator to the amount of the overcharge where the violator could show that the violation was not willful nor the result of failure to take practicable precautions, altered what Congress decided to be an inequitable feature of the original law. It was always the policy of the Administrator to offer to settle such cases for the amount of the overcharge, and the chief drawbacks of the amendment were to introduce further complex issues into the investigation and proof and to make the settlement of cases without litigation more difficult. It also lessened somewhat *the deterrent effect of the sanction* but this was minimized by the retention of the treble damage feature for cases of proven willfulness. On the whole, we feel that thus far the amendment has worked out satisfactorily and we do not suggest that it be modified. (Italics supplied.)

to the wilful violator.[14] Instantly wilful violation is involved.

(3)

In *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 338, the Supreme Court pointed out that the words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for interpretative regulation, nor that the Treasury there usurped legislative function when it excluded from their import expenses incurred under contracts that might tend to spread insidious influences through legislative halls. In the *Heininger* case, *supra,* the Court emphasized the independent function of the Tax Court in interpreting and applying the statutory language to a particular set of facts and the essentially factual nature of the question as to whether a particular expenditure is directly related to a business and whether it is ordinary and necessary. (Pp. 470, 475.) In *Helvering* v. *Hampton, supra,* this Court explained the reason for the rule here governing as follows (p. 359)—

> the allowance of the claimed deduction is refused because it consists of a fine for violating governmental statutes or regulations or legal expenditure in defense of prosecutions for such offenses. The basis of these decisions is that the taxpayer, in offending the state or federal government, is engaged in a transaction which governmental policy forbids being considered as a part of the business. * * *

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[14] Statement of President Roosevelt on Signing the Stabilization Extension Act of 1944, June 30, 1944, 1 Pike & Fischer, O.P.A. Service, p. 2:249 (1942):

> I know that the Congress *in relaxing the penalties against non-willful violations* was anxious to protect only those acting in good faith and not those who do not wish to know what the law requires of them. But I fear that the changes made will weaken and obstruct the effective enforcement of the law. I hope that experience may not justify my fear. (Italics supplied.)

So here, the decision of the Tax Court on the instant record, having taken into account the presumption supporting the Commissioner's ruling, ought not to be reversed; certainly its construction of the words "ordinary and necessary" and their proximate relation to the business is permissible. In *Burroughs Bldg. Material Co.* v. *Commissioner, supra,* the Court of Appeals for the Second Circuit quoted with approval language from an English case (*Inland Revenue Commissioners* v. *Von Glehn,* [1920] 2 K. B. 553), which had denied deduction as a business expense of a penalty imposed for innocent violation of customs laws, as follows (p. 179):

> Thus Warrington, L. J., remarked in *Inland Revenue Commissioners* v. *Von Glehn, supra*:
>
> "* * * It cannot be said that this disbursement was made in any way for the purpose of the trade or for the purpose of earning the profits of the trade. It was made * * * because the individuals who were conducting the trade had * * * been guilty of an infraction of the law."

See, also, the similar reasoning of the same Court of Appeals in the *National Outdoor Advertising Bureau* case, *supra,* where it was held with respect to such expenditures (p. 881)—

> that even though they might be "ordinary" in the sense that they were not unusual, they could not be "necessary," since the law will not recognize the necessity of engaging in illegal courses in the conduct of a business.

Surely, deductions as grants made in the exercise of legislative grace must not be perverted to frustrate national policy, and the Tax Court did not err here in interpreting the language of the statute to prevent such misuse. On the other hand, as is well settled, in apply-

ing such legislative grants equitable considerations have no place (*Deputy* v. *duPont,* 308 U. S. 488, 493); and as we have seen, *supra,* the burden is incumbent upon taxpayer to establish its clear right to a claimed deduction. Thus, recently, the First Circuit in *Friedman* v. *Delaney,* 171 F. 2d 269, 270, certiorari denied, 336 U. S. 936, said:

> We are obliged to inquire whether the circumstances of this loss—no matter how creditably incurred—are clearly within the coverage of either Section referred to. Nor can equitable considerations be allowed to control.

Finally, the conclusion of the Court of Appeals for the Second Circuit in the earlier *Burroughs Bldg. Material Co.* case, *supra,* seems better founded on principle and authority than the distinction expressed in the recent *Rossman* opinion (p. 180):

> But, whatever reasoning be adopted, it is a fact that both in this country and England fines have not been allowed as business expenses even when they were due either to incidents of the business almost inevitable or to innocent mistakes. * * *

We submit that the Supreme Court did not reject this rule in the *Heininger* case.

Furthermore, certainly where, as here, the violation was knowing and wilful, and not due to an "almost inevitable" incident of business or to an "innocent mistake," the *Heininger* case supports the disallowance of the penalty payment. Even on the distinction taken in the *Rossman* case (p. 714), the allowance of the deduction here of the penal sum paid to the United States in settlement of wilful violation and not shown to have been limited to the overcharge, would frustrate the sharply defined policy of Congress proscribing profiteering in time of national emergency.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * *

(26 U.S.C. 1946 ed., Sec. 23.)

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23:

Sec. 205 * * *

* * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by

the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(50 U.S.C. App., 1940 ed., Supp. III, Sec. 925.)

Stabilization Extension Act of 1944, c. 325, 58 Stat. 632:

Sec. 108. * * *

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided,*

however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

(c) The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the

date of enactment of this Act and with respect to proceedings instituted thereafter.

(50 U.S.C. App., 1940 ed., Supp. IV, Sec. 925.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.23 (a)-1. *Business Expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23 (b) to 23 (z), inclusive, and the regulations thereunder. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. * * *

* * * * *

Sec. 29.23 (q)-1. *Contributions or Gifts by Corporations.*—* * * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

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